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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In 1980-1981, the Michigan Legislature passed statutes increasing workers' compensation benefits for workers injured thereafter and permitting employers to offset other "employer financed" benefits against the workers' compensation benefits otherwise due and owing.

General Motors and Ford took the position that while these enactments did not increase the workers' compensation benefits payable to workers injured prior to 1982, the statutes did relieve the Companies of the preexisting obligation to pay such workers the full amount of workers' compensation as originally established (by permitting offsets for other "employer financed" benefits).

General Motors' and Ford's actions in this regard were immediately—and successfully—challenged administratively and in the lower state courts. Eventually, however, the Michigan Supreme Court—in an earlier case involving General Motors to which respondents in the instant case were not parties—upheld the legality of retroactive coordination on statutory interpretation grounds; in so doing the Michigan Court agreed with General Motors that the adversely affected workers had no valid Contract Clause or Due Process Clause claim.

The 1987 Michigan Legislature responded by enacting a second—remedial and curative—statute requiring all covered employers to honor their workers' compensation benefit obligations incurred prior to 1982 according to the original statutory terms.

The first question presented is

> whether the 1987 Michigan enactment violates the Constitution's Contract Clause.

The second question presented is

> whether the 1987 Michigan enactment violates the Due Process Clause.

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BRIEF FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

COUNTERSTATEMENT OF THE CASE

1. Background

In 1912 Michigan enacted a workers' compensation law providing that workers suffering injuries "arising out of and in the course of their employment" shall receive, as their exclusive remedy against their employer and fellow employees, scheduled weekly compensation and medical benefits; the injured workers' rights in this regard were made enforceable through administrative proceedings. P.A. 1912, 1st Ex. Sess., No. 10, Pt. I § 4, Pt. II, § 1; Pt. III, § 1; now 1969 PA 317, as amended ("the Act"), §§ 131, 201 & 301, MCL 418.131, .201 & .301, MSA 17.237(131), (201) & (301). See generally, *Lahti* v. *Fosterling*, 357 Mich. 578, 585, 99 N.W.2d 490, 493 (1959).

Although initially elective, since 1943 the Act's coverage, and adherence to its provisions, have been compulsory. 1943 PA 245; *Dation v. Ford Motor Co.*, 314 Mich. 152, 161-162, 22 N.W.2d 252, 256 (1946); Act § 111, MCL 418.111, MSA 17.237(111). Employers and their employees are thus forbidden to vary the Act's terms. *Harrington v. Department of Labor and Industry*, 252 Mich. 87, 233 N.W. 361 (1930); *Henry v. Ford Motor Co.*, 291 Mich. 535, 540, 289 N.W. 244, 246 (1939). Indeed, employee claims can only be settled ("redeemed") with official agency approval and after hearing. Act § 835, MCL 418.835, MSA 17.237(835).

Precisely to preclude any reliance claims regarding "closed," "settled," "completed" or "fully satisfied" periods or transactions, the Act has long provided that, "Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." Act § 831, MCL 418.831, MSA 17.237(831).

As a general matter, however, the law in effect at the time of *injury* controls an employee's right to—and level of—workers' compensation benefits. *Tarnow v. Railway Express Agency*, 331 Mich. 558, 50 N.W.2d 318 (1951). The exception has been that the Michigan Legislature has from time to time *improved* benefits by retroactive remedial amendments.[1]

Prior to the events at issue here the Michigan Legislature had never reduced workers' compensation benefit rates by an amendment enacted subsequent to the injury, even prospectively. Prior to 1982, moreover, an employer's benefit obligations could not be reduced to take into account the injured worker's receipt of other employer-financed payments. Act § 811, MCL 418.811, MSA 17.237(811) ("[B]enefits derived from any other source than those paid or caused to be paid by the employer as provided in [the worker's compensation act, shall not] be considered in fixing the compensation under this act . . .").

2. The Genesis of the Instant Case

Against this background, Respondent Evert Romein, in the course of his employment with General Motors Corporation, suffered disabling pelvic and hip injuries in a fall on December 5, 1977. General Motors did not dispute its workers' compensation liability and, beginning in 1977, the Company commenced and continued statutorily required benefit payments to Mr. Romein. As of March 30, 1982 these payments were $99.00 per week.

[1] *Rookledge v. Garwood*, 340 Mich. 444, 65 N.W. 2d 785 (1954) (deleting requirement that employee elect between workers' compensation and third-party tort claim); *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W. 2d 490 (1959) (extending duration of medical benefit); *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414 (1977) (requiring employer's payment of 70 percent of benefits pending employer's appeal); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W. 2d 184 (1984); on resubmission, 419 Mich. 32, 348 N.W. 2d 652 (1984) (increasing interest rate on unpaid weekly benefits); *Spencer v. Clark Township*, 142 Mich. App. 63, 368 N.W. 2d 897 (1985) (extending coverage to volunteer ambulance drivers and attendants).

Respondent Arturo Gonzalez, in the course of his employment with Ford Motor Company from 1953 to 1980, contracted a disabling lung condition—silicosis—as a consequence of work-related foundry exposure. In September of 1981, Ford agreed, with agency approval, to pay—and Ford commenced payment of—workers' compensation benefits to Mr. Gonzalez in the amount of $176.00 per week.[2] (Joint Appendix, hereinafter "J. App.," 12).

As noted above, under the Michigan law applicable at the time, General Motors' and Ford's obligation to make workers' compensation benefit payments to Messrs. Romein and Gonzalez in the amounts just stated was not subject to reduction on account of the injured workers' receipt of other "employer-financed" benefit payments, such as the pension benefits to which both were entitled and which both began to receive following their injuries.

3. The 1981 Act

After Messrs. Romein and Gonzalez began receiving the workers' compensation benefits just stated, the Michigan Legislature enacted a package of amendments to the State's workers' compensation law. Insofar as relevant here, these amendments provided (1) a prospective improvement in the workers' compensation benefit rate for workers injured on or after January 1, 1982;[3] and (2) an employer right to reduce the amount paid in workers' compensation to take account of (to "coordinate") certain other "employer-financed" benefits.[4] The 1980-81 legislative package did *not* improve the workers' compensation benefits paid by employers to workers—such as

[2] Michigan's Silicosis, Dust Disease and Logging Industry Compensation Fund was obligated to reimburse Ford for all weekly benefits paid to Mr. Gonzalez in excess of an aggregate of $12,500.

[3] 1980 PA 357, § 1; MCL 418.351, MSA 17.237(351); MCL 418.355, MSA 17.237(355). (The "1980 Act.")

[4] 1981 PA 203, effective March 31, 1982; MCL 418.354, MSA 17.237(354). (The "1981 Act.")

Messrs. Romein and Gonzalez—injured before January 1, 1982.[5]

4. The General Motors/Ford Position

Nevertheless, General Motors and Ford, virtually alone among Michigan employers, contended that by reason of the 1981 Act, the workers' compensation benefits payable to workers who were injured prior to 1982—and who did not share in the 1981 Act's improvements in benefit rates —were as subject to deduction of "employer-financed" benefits ("coordination") as were the workers' compensation benefits of those who did share in those improvements.

In September 1983, approximately a year and one half after the effective date of the 1981 Act, General Motors *unilaterally* began *retroactive* "coordination" of Mr. Romein's workers' compensation benefits, based on his receipt of social security benefits and a pension. (J. App. 5) His workers' compensation benefits were reduced to *zero*. In August, 1982, Ford "coordinated" Mr. Gonzalez' pension benefits against his workers' compensation benefits, reducing his workers' compensation benefits to *zero*. These "coordinations" were part of an overall program

[5] Some employees injured prior to January 1, 1980 did receive a small *state-financed—as opposed to employer-financed*—supplement. MCL 418.352(8), (10); MSA 17.237(352)(8), (10); MCL 418.391; MSA 17.237(391). However, the supplemental benefit is not payable to persons such as Mr. Gonzalez, injured after 1979; and is, indeed, unavailable to the vast majority of all claimants. *Juneac v. ITT Hancock*, 181 Mich. App. 636, 450 N.W. 2d 22 (1989), lv. den. 434 Mich. 901 (1990), rec. den. 437 Mich. 951 (1991). At most, the supplement provides a fraction of the particular injured worker's compensation benefit as of January 1, 1982, without any subsequent adjustment. The state-paid supplement to Mr. Romein, for example, was $28 per week. (The assertions at pp. 3 and 26-27 of Petitioners' Brief and at n.6, p. 16 of the *amici curiae* brief of Citizens Insurance Company *et al.*, that the supplement was thus a "substantial" "cost-of-living" adjustment that "entitled[] eligible employees to receive *up to* the same weekly compensation as persons injured *after* January 1, 1982" (emphasis added), are thus belied by the facts.)

that affected all similarly situated General Motors and Ford workers.

5. The Adverse Reaction to the GM/Ford Position

The workers' compensation administrative agency, the lower courts, the Legislature and other employers disputed the GM/Ford position.

Thus, Mr. Romein filed a petition in November, 1983 with the Michigan Bureau of Workers' Compensation, objecting to the "coordination" of his workers' compensation benefits; in June, 1984, an administrative law judge ordered that the benefits be paid without "coordination." In October, 1984, an administrative law judge held that Ford had "improperly coordinated and reduced [the workers' compensation] benefits due and owing" Mr. Gonzalez and assessed a $1500 penalty against Ford. In other cases brought by similarly affected workers, the workers' compensation administrative agency consistently ruled against the employers. *See Chambers* v. *General Motors Corp.*, 1982 WCABO 751, lv. den. Mich. Ct. App. No. 67973 (April 25, 1983).

Likewise, the Michigan Court of Appeals ruled "that the Legislature intended the entire coordination-of-benefits reform to apply only to injuries incurred after the effective dates of those reforms." *Franks* v. *White Pine Copper Div., Copper Range Co.*, 122 Mich. App. 177, 185, 332 N.W.2d 447, 449 (1982).

Also, in early 1982, the Michigan Senate and House each adopted a resolution declaring that the coordination of benefits provided for by the 1981 Act did *not* apply to workers injured before March 31, 1982, the effective date of the coordination provisions.[6]

[6] The Legislature stated that 1981 PA 203 "was not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date. . . ." Senate Concurrent Resolution No. 575, adopted by the Senate on April 1, 1982 (1982 Senate Journal, p. 705), and adopted by the House of Representatives on May 18, 1982 (1982 House Journal, p. 1262).

Generally, other employers—including General Motors' and Ford's major competitor, Chrysler—did not "coordinate" the workers' compensation benefits of workers injured before March 31, 1982. As the Michigan Manufacturers Association later acknowledged in its *amicus curiae* brief below (at p. 3):

> It was well known that the applicability of section 354 [of the 1981 Act] to claimants injured before March 31, 1982, was controversial. Those employers and carriers who began, prior to this court's [1985] decision in *Chambers*, to coordinate worker's compensation benefits with other employer-funded wage-replacement sources did so at their peril, and in the knowledge that litigation over the statute's applicability was pending.

6. The *Chambers* Decision

Eventually, however, the Michigan Supreme Court concluded that, because the Michigan Legislature had not expressly stated otherwise, the 1981 Act should be construed to permit coordination of workers' compensation benefits regardless of the date of injury. *See Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W. 2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).[7]

In the *Chambers* litigation, the Michigan Court rejected the claimants' argument that to apply the 1981 coordination legislation to workers injured before its effective date would defeat their legitimate expectations and would violate their alleged vested rights under the Contracts and Due Process Clauses of the Constitution. In that case, General Motors—taking a position diametrically opposite to the one asserted here—contended that those clauses and principles were not applicable. See the

[7] The Michigan Court ruled in *Chambers* that since the 1982 resolutions passed by the Legislature (referred to in the text above) were not embodied in a statute signed by the Governor, those resolutions were not binding expressions of legislative intent. 422 Mich. at 659; 375 N.W.2d at 725.

Appendix A hereto, fully setting out the pertinent portion of General Motors' Brief in *Chambers*.[8]

The Michigan Supreme Court, agreeing with General Motors, held that "[w]orkers' compensation benefits are social-welfare income-maintenance benefits," which the Michigan Legislature is free to change at will. 422 Mich. at 654, 375 N.W.2d at 722. "In providing for such benefits, the Legislature did not covenant not to amend the legislation." 422 Mich. at 654, 375 N.W.2d at 723.

7. The Reaction to the *Chambers* Decision; and the Decision Regarding Rehearing

The *Chambers* decision generated immediate and strong reaction. Former Michigan Governor William Milliken, the sponsor of the 1981 Act (who is quoted approvingly at p. 3 of the Brief for Petitioners), disavowed the Michigan Supreme Court's conclusion:

> It was our purpose, as my remarks quoted in the opinion indicated, to apply the concept of coordination of benefits but only to those persons who would under the new legislation be receiving improved benefit rates against which any set-offs of other benefits might occur. *It was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments.*[9]

[8] The General Motors' *Chambers* brief—citing *Lahti v. Fosterling, supra; Selk v. Detroit Plastic Products, supra*, and other Michigan Supreme Court precedents—contended that "'no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law'" and that "'that which the legislature gives, it may take away. . . .'" Brief, p. 21.

[9] Letter to counsel dated October 25, 1985, later published to the Michigan Supreme Court and made part of the record below. (J. App. 32) (emphasis added).

Governor Milliken's Workmen's Compensation Director, a principal advocate of "coordination" who had represented the Governor before the Legislature, added:

> As director of the Bureau of Workers' Disability at the time, I was personally involved in the long and often intense negotia-

This and other expressions of surprise and dismay followed the *Chambers* decision, especially intensified by press reports that employers and insurance carriers who had *not* "coordinated" prior to the *Chambers* decision were seeking recoupment of benefits from an estimated 40,000 injured workers.[10]

Although the Michigan Supreme Court subsequently denied a motion to rehear *Chambers*, 424 Mich. 1202, 389 N.W.2d 685 (December 30, 1985), the author of the original opinion, Justice Boyle, dissented, noting the "harsh and unforeseen consequences" of the Court's decision, and stating, "The incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases." 424 Mich. at 1203, 389 N.W.2d at 685. (Three justices of the Court—thereby, with Justice Boyle, a majority—disclaimed having expressed an opinion on recoupment. 424 Mich. at 1202-03, 389 N.W.2d at 685.)

8. Immediate Legislative Response and the 1987 Act

Legislative response to the Michigan Supreme Court's *Chambers* decision and to its "harsh and unforeseen" consequences was swift.

On October 16, 1985—even before the decision denying the *Chambers* application for rehearing—House Bill No.

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tions on these and other reform measures. I can assure you it was never the intent of the Milliken administration or, for that matter the Legislature to have the co-ordination-of-benefits provisions apply to those with an injury date prior to the effective date of the amendments. [J. App. 29]

Professor Theodore J. St. Antoine, who had headed Governor Milliken's study commission that had recommended "coordination," disavowed the implication in *Chambers* that he had contemplated or that he had endorsed retrospective application of that concept. (J. App. 34)

[10] "Lawmakers contest court interpretation of worker's comp," Detroit Free Press, November 3, 1985; "Firms cut checks for disabled workers," Detroit Free Press, November 29, 1985; "Ruling on work disability pay stands," Detroit Free Press, December 31, 1985.

5084, limiting coordination to "personal injuries occurring on or after March 31, 1982," was introduced. Within a few weeks, on January 29, 1986, the bill, as amended to require refunds with interest to claimants injured before March 31, 1982 whose benefits had been coordinated, passed the House by an 87-14 vote. (1986 House Journal No. 10, pp. 135-137, January 29, 1986; Appendix B hereto.)

On January 16, 1986, Senate Bill No. 625 was introduced, similarly restricting coordination to "personal injuries occurring on or after March 31, 1982." Efforts to obtain Senate passage continued until the Legislature enacted, and the Governor approved, 1987 PA 28, immediately effective May 14, 1987 (the "1987 Act").[11] The 1987 Act had bipartisan as well as business and labor support and passed 95 to 0 in the Michigan House and 35 to 1 in the Senate. The 1987 Act—after declaring that "it having been and being the legislative intention not to coordinate payments . . .resulting from liability . . . for personal injuries occurring before March 31, 1982"—expressly prohibited the coordination of workers' compensation benefits for such injuries and required refunds by employers and carriers of any coordination deductions that had been made. 1987 PA 28, § 354(17)-(20), MCL 418.354(17)-(20), MSA 237 (354(17)-(20)).[12]

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[11] The "Versions of Bill Leading Up To 1987 PA 28, § 354," at J. App. 36-45, only covers the evolution of Senate Bill No. 67 in 1987. The House Substitute provisions (see, e.g., J. App. 40-41 and 44-45) were eventually adopted by a conference committee of the Senate and House (1987 S.J. No. 46, pp. 1231-2, May 4, 1987; 1987 H.J. No. 45, pp. 1231-2, May 14, 1987) and contain verbatim what had been adopted by the House a year earlier, on January 29, 1986, in HB No. 5084 (substitute), with the added statement of legislative intent in § 354(17).

[12] The 1987 Act as signed into law, also contained two crucial provisions sought by General Motors, Ford and other employers, to narrow the Act's definition of "disability" and to narrow the "intentional tort exception" to exclusivity under the Workers' Compensation Act, as declared by the Michigan Supreme Court in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W. 2d 882 (1986). (J. App. 53-56).

At the time of its passage, the then Director of the Bureau of Workers' Disability Compensation, Edward M. Welch, summarized the legislative purpose of the 1987 Act as being to "correct" the "situation" caused by the "surpris[ing]" *Chambers* decision.[13]

9. The Post-1987 Act Litigation

General Motors and Ford subsequently contested the constitutionality of the 1987 Act in this and other litigation.[14] In so doing, General Motors and Ford argued, first, that the 1987 Act violated the *State* Constitution's provisions concerning separation of powers in that the 1987 Legislature had improperly "overruled" the Michigan Supreme Court's 1985 *Chambers* decision; and second—and contrary to General Motors' own prior position in the *Chambers* case—that the 1987 Act impaired the Companies' vested rights, in purported violation of the United States Constitution's Due Process and Contract Clauses.[15]

When the Companies appealed to the Michigan Supreme Court, that court *unanimously* rejected their Contract

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[13] Michigan Department of Labor "LABORegister," June, 1987, at 91.

[14] General Motors and Ford, together with the Michigan Mutual Insurance Company, sued Edward M. Welch, Director of the Bureau of Workers' Compensation, Frank J. Kelley, Attorney General, and John H. Chambers, appellee in the *Chambers* case, to challenge the constitutionality of the 1987 Act. Ingham Circuit Court No. 87-59051 CZ (Hon. Peter D. Houk). The trial court upheld the constitutionality of the Act and dismissed the suit. The plaintiffs subsequently appealed to the Michigan Court of Appeals, No. 104980, which has stayed proceedings pending decision in the instant case.

[15] After the Workers' Compensation Appeal Board, on May 20, 1987, reversed the decision of the administrative law judge and held for General Motors in the *Romein* case and the Appeal Board, on May 27, 1987, relying on the 1987 Act, affirmed the decision of the administrative law judge against Ford in the *Gonzalez* case, the Michigan Court of Appeals granted review and consolidated the cases. On May 16, 1988, the Court of Appeals reversed *Romein* and affirmed *Gonzalez*, upholding the constitutionality of the 1987 Act. 168 Mich. App. 444, 425 N.W. 2d 174 (1988).

Clause arguments. Justice Riley dissented solely on the *state law* claim that the 1987 Act violated separation-of-powers principles; and Justice Griffin, alone, dissented on the Companies' federal Due Process claim in an opinion relating that claim to the state, separation-of-powers ground and apparently only to the *post-Chambers* period.

SUMMARY OF ARGUMENT

Petitioners' main contention is that the Michigan workers' compensation statute creates "contractual obligations" protected by the Contract Clause. That contention is fatally flawed in four different respects:

I. The Contract Clause does *not* address the impairment of obligations of a *non-contractual nature*. And, "It has long been settled by decisions of this Court that the word 'contracts' in § 10 of article 1 of the Constitution is used in its usual or popular sense, by signifying an agreement of two or more minds, with sufficient consideration, to do or not do certain acts." *Crane v. Hahlo*, 258 U.S. 142, 146 (1921). The obligation claimed to be impaired here has none of the attributes of a contract; it is simply and only a substantive obligation mandated by an economic regulatory statute, and as such is not within the ambit of the Contract Clause. *Infra*, pp. 13-19.

II. If, *arguendo*, the workers' compensation statute here were somehow to be deemed to create "contractual obligations," petitioners' "contractual obligations" to respondents would have been fixed on the dates of respondents' injuries, which occurred prior to the enactment of the 1981 amendment on which petitioners rely; indeed, respondents had retired prior to the effective date of that amendment and had no contracts of employment with petitioners. The 1987 amendment, which petitioners challenge, did no more than reverse the impact of the 1981 amendment on respondents' benefits and *restore* to respondents their rights under the law that existed at the time their "contracts" were consummated. *Infra*, pp. 30-36.

III. In any event, aside from the points just outlined, the Contract Clause claim here must fail under this Court's established standard for determining whether an "impairment" has occurred within the meaning of the Clause. Given the history of workers' compensation legislation in Michigan, and the particular circumstances of the amendments here in question, petitioners could not have had a "reasonable expectation" that the Michigan Legislature had conclusively decided to permit coordination of benefits for workers injured prior to 1982. Moreover, the legitimate public purpose and the reasonableness of the 1987 amendment's restoration of benefits to the levels existing at the time of injury for those who had been injured prior to 1981 are readily apparent. *Infra*, pp. 36-42.

IV. Petitioners' call for a new Contract Clause jurisprudence based upon what petitioners' claim is the "original understanding" of the Framers cannot be justified. Petitioners' "original understanding" presentation is nothing more than a restatement of a position that has already been rejected after a searching examination by this Court and, thus, does not constitute the special showing required for a departure from *stare decisis*. Further, petitioners' own analysis cannot be squared with the "original understanding" they put forth. What is more, petitioners' invocation of an "original understanding" is both selective and self-serving. Petitioners omit materials that do not serve their cause, and fail to acknowledge the far-reaching implications of their position. *Infra*, pp. 42-50.

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Petitioners' Due Process Clause claim is nothing but their Contract Clause claim rephrased. The due process standard for judging the constitutionality of retroactive statutory regulation is, moreover, less "searching" than the standard applied under the Contract Clause. And the 1987 amendment clearly satisfies the requirements of the Due Process Clause: *viz.*, that a retroactive application is justified by a rational legislative purpose. *Infra*, p. 50.

ARGUMENT

I. A Mandatory Government Economic Regulation Enacted Precisely to Deny Parties the Freedom to Negotiate Their Own Agreement on the Matter Covered by the Regulation—Such as the Michigan Workers' Compensation Act—Creates Statutory Obligations Not Contractual Obligations

Petitioners' main contention is that Michigan's workers' compensation statute creates "contractual obligations" protected by the Constitution's Contract Clause (Art. I, § 10, cl. 1). That contention flies in the face of the well-settled law in this Court. As *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) states: "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract." And as *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983), therefore reaffirms: "[A] workmen's compensation law may [constitutionally] be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917)." In the discussion that follows we show why these two propositions are—and should be—the law.

A. (1) Like the alchemists, petitioners have an urgent need: to transmute a base metal—a Due Process Clause challenge to an economic regulatory enactment—into a rare and more valuable substance (to a plaintiff)—a Contract Clause challenge to that legislation—and to do so through mystical incantations and prestidigitation. That need stems from the governing rule that "legislative Acts adjusting the burdens and benefits of economic life" violate the Due Process Clause only if "the legislature has acted in an arbitrary and irrational way," *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), while legislation altering contractual obligations is subject to a more "searching standard[]" of review, *Pension Benefit Guaranty Corp.*, 467 U.S. at 733.

Petitioners' difficulty in this regard is that the Contract Clause—"No State shall . . . pass any . . . Laws impairing the Obligation of Contracts . . . ." (Art. I, § 10, cl. 1)—plainly does *not* address the impairment of obligations of a *non-contractual nature*; impairment of "the obligation of contracts" is the touchstone of this limitation on the power of the States.

Given the Constitution's language and structure, state tax legislation, for example, is *not* subject to Contract Clause scrutiny but only to Due Process Clause scrutiny since "[t]axation is . . . [not] a liability which [the taxpayer] assumes by contract." *Welch v. Henry*, 305 U.S. 134, 146 (1938). Similarly, the federal legislative provisions for "railroad [retirement] benefits, like [the federal provisions for] social security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980).

Contractual relations, in other words, are not the totality of social relations, and contract law is not the totality of the law. The parties to any contract negotiate and reach a meeting of the minds against the background—and within the limits—set by judge-made mandatory rules such as those stated in the tort law and mandatory legislature-made rules such as those stated in the tax laws and in the laws regulating economic activity. Contracting thus takes place within the leeways left open by public law.

As we develop at length, the hallmarks of contract law—and of contractual obligation—are that the parties' rights and duties are created through a knowing and voluntary exchange of promises that the courts of law recognize as legally binding and that are enforceable through the procedures (and according to the remedies) those courts—and the legislatures—have devised over time to facilitate a system of free markets and free exchange.

That being so, legislation—such as the workers' compensation statute here—creating mandatory substantive

obligations that bind those who engage in a given economic activity regardless of their knowledge of, or their consent to, the legislation's terms, and making those obligations enforceable through an administrative scheme has *none* of the hallmarks of a contract and does *not* create any contractual obligation.

Contracts and mandatory regulatory enactments, then, are two *alternative, competing legal approaches* to the ordering of economic life and not a single featureless legal category. As this Court stated in *New York Central R. Co. v. White*, *supra*, 243 U.S. at 206, in rejecting a due process challenge to New York's mandatory workers' compensation statute, "we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable on that ground."

It would be paradoxical in the extreme if a law designed to "limit the freedom of employer and employee to agree respecting the terms of employment" were to be deemed to enlarge their contractual relationship by creating a contractual "term of employment."

(2) Stripped of its rhetoric, petitioners' contrary argument reduces to the following proposition: because the parties here had a contractual relationship covering terms and conditions of employment *other* than the matters covered by the workers' compensation statute, the obligations created by that statute must be treated as if those obligations, too, were contractual obligations. Petitioners would have it that because the contract *actually* reached by the parties is based in part upon the parties' assumptions as to the extent of the substantive obligations imposed by the statute, it is proper to "incorporate" the statutory obligations into the contract. Pet. Br. at 10-16.

To be sure, a prudent party enters into a contract only after assessing the possible effects that external events beyond his control—including changes in existing statutory

or case law—may have on the benefits and burdens to be expected from the bargain. And it is true that changes in the workers' compensation statute could affect an employer's overall employment costs and thus affect whether an agreement to pay certain wages or provide certain pension benefits turns out to be a wise bargain from the employer's point of view. But, by the same token, the wisdom of that bargain may be affected, for example, by changes in the tax laws or the environmental laws, by competitive changes in the market for the employer's product, or by political changes in the Persian Gulf.

Neither our system of contract—nor the Contract Clause—protects contracting parties from the consequences of such external changes of circumstances, unless those parties explicitly condition their promises, where legally permissible to do so, on the occurrence or nonoccurrence of those changes. To the contrary, both our system of contract and the Contract Clause contemplate that the contracting party who best predicts—or best provides for—possible external changes beyond his control will come out best. The law of contracts and the Contract Clause do not guarantee that there will be no such changes.

That being so, on the facts here, petitioners simply had no basis for relying on the assumption that the Michigan Legislature would not, and constitutionally could not, exercise its previously exercised authority to amend the workers' compensation statute in a way that would increase the costs of employers who had "coordinated" the benefits of workers injured prior to 1982.

B. The legal concept of "contract"—and the distinct social values embodied in a system for enforcing "contractual obligations"—have, of course, been central to our common law system. This rich historical tradition helps define the agreements protected by the Contract Clause and the purposes for which such agreements were singled out for special protection.

Williston defines "contract" as "*a promise, or set of promises*, for breach of which the law gives a remedy, or

the performance of which the law in some way recognizes as a duty." Williston on Contracts, § 1, at 1 (3d ed. 1957) (emphasis added). The Restatement adopts the Williston definition *in haec verba*, and adds that a "term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations." Restatement (Second) of Contracts §§ 1, 5 (1981). Corbin states that "contractual duty is imposed by reason of *promissory expression*." Corbin, *The Law of Contracts*, § 18, at 39 (2d ed. 1963) (emphasis added).[16]

It is equally to the point that "contract" and "contractual obligation" are defined not only by a process of inclusion but of exclusion as well. Thus, Williston distinguishes contractual rights and duties from those "rights and duties [which] are defined by law and imposed upon the parties *without any question of their knowledge of or assent to these specific terms*." Williston *supra*, § 32, at 90 (emphasis added). *See also* Restatement, *supra*, § 5 comment c. Centuries earlier, Blackstone drew the same distinction:

> [Municipal law] is also called a rule, to distinguish it from a compact or *agreement*; for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or "shalt not, do it." It is true there is an obligation which a compact carries with it; equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing

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[16] Promises giving rise to contractual obligations may be expressly stated by the contracting parties, or may be implied from the parties' conduct. In the latter circumstance an "implied-in-fact" contract is said to be created. "The distinction is not based on legal effect but on the way in which mutual assent is manifested." Williston, *supra*, § 3, at 8-9. *Accord* Restatement, *supra*, § 4; *Corbin, supra*, § 18, at 41.

at all. [Blackstone, Commentaries, Vol. I, at 45 (emphasis in original).]

C. Art. I, § 10 cl. 1 prohibits "State . . . Law[s] impairing the Obligation of Contracts." And,

> It has long been settled by decisions of this Court that the word "contracts" in § 10 of article 1 of the Constitution is used in its usual or popular sense, as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. "Mutual assent" [express or implied] "to its terms is of its very essence." *Louisiana ex rel. Folsom v. New Orleans*, 109 U.S. 285, 288; *Freeland v. Williams*, 131 U.S. 405, 414; *Essex Public Road Bd. v. Shinkle*, 140 U.S. 334, 340; *Morley v. Lake Shore & M. S. R. Co.* 146 U.S. 162, 169; *Garrison v. New York*, 21 Wall. 196, 203. [*Crane v. Hahlo*, 258 U.S. 142, 146 (1921) (brackets by Court).]

Of the cited cases the fullest and most informative discussion is that in *Garrison v. New York*. Justice Field, speaking for the Court, began by stating:

> It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is something called by text writers a contract of record, because it establishes a legal obligation to pay the amount recovered and, by fiction of law, where there is a legal obligation to pay, a promise to pay is implied. . . . But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement, express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. [88 U.S. at 203.][17]

[17] As *Garrison* makes plain, while "express" agreements and "implied in fact" agreements are equal and integral components of the contractual regime, "agreements implied in law" are *not* part of that regime at all.

To be sure, at English common law, for lack of an applicable common law writ, "quasi-contractual" obligations were enforceable in a "contract" form of action—*viz.*, by writ of assumpsit—rather than a "tort" action. Tort was found wanting because tort and quasi contract "obligations differ on one important particular; for while to avoid committing tort, one need only forbear, to discharge the obligation imposed by quasi-contract one must act." Keener, *A Treatise on the Law of Quasi-Contracts* 15 (1893) (footnote omitted). *Accord* Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, 63-64 (1888).

But, while the *remedy* for violation of a quasi-contractual obligation lay in assumpsit at English common law, there was no pretense that the *obligation itself* was "contractual" in nature. Thus, in the famous case of *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (Ct. of King's Bench 1760), Lord Mansfield held that an assumpsit action would lie to compel the defendant to return money unjustly obtained from the plaintiff even though it was concededly "impossible to presume any contract to refund the money." The justification for this result was: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it)." *Id.*

In sum, an "obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor." *Ames, supra*, 2 Harv. L. Rev. at 63. *Accord* Corbin, *Quasi-Contractual Obligations*, 21 Yale L. J. 533, 534 (1912); Williston, *supra*, § 3, at 10; Restatement, *supra*, § 4b.

[18] In other contexts as well, the Court has recognized that mutual assent is the essence of "contract." Thus, for example, the Court

The *Garrison* Court did not rest on this definitional approach alone but went on to add:

> *The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference.* If no assent be given to a transaction, no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition. [*Id.* (emphasis added). *Accord Louisiana ex rel. Folsom v. New Orleans, supra*, 109 U.S. at 288.]

The Court's more recent opinions are to the same effect. *See e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978) (Contract Clause protects obligations "voluntarily agreed to"); *id.* at 245-46 & n.18 (Contract Clause protects "bargained-for" expectations).[18]

The purpose of the Contract Clause is thus to protect the core purposes of contract law itself. Contract law is a corpus of legal rules designed to discover and give effect to the promises that the contracting parties have voluntarily made to each other. As Corbin aptly titles the opening section of his contracts treatise, "The Main Purpose of Contract Law is the Realization of Reasonable Expectations *Induced by Promises.*" Corbin, *supra*, *The Law of Contracts*, § 1, at 1 (emphasis added). *See also Williston*, *supra*, § 1, at 3.

The point of an exchange of promises supported by consideration is to induce a reasonable expectation that the promisor will act as he has stated he will act. It is for this reason that the law of contracts holds the promisor to his promise. And, it is for this reason that the particular subject of the Contract Clause is state enactments that frustrate the expectations created by the very nature of promissory expressions and of the law of contracts as generally understood.

In contrast, statutory law creating a substantive obligation is an act of sovereign will. As such there is nothing inherent in the act of passing a statute that carries with it an undertaking to maintain the statute as enacted. Indeed, in the nature of things a sovereign act negates any such assumption. As this Court has repeatedly emphasized, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Pension Benefit Guaranty Corp.*, *supra*, 467 U.S. at 729-730 (quoting *Turner Elkhorn Mining*, *supra*, 428 U.S. at 15-16) (citations omitted).

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of Claims has by statute been given jurisdiction over various contract disputes. This Court has held that these jurisdictional grants extend to "an agreement 'implied in fact,' founded upon a meeting of the minds," but "not an agreement 'implied in law,' more aptly termed a constructive or quasi contract." *Baltimore & Ohio Railroad Co. v. United States*, 261 U.S. 593, 597-98 (1922).

The only relevant "undertaking" made by a state legislature in enacting mandatory regulations is one that is imposed by the Due Process Clause—*viz.*, that the legislature will make rational, non-arbitrary determinations as to whether to amend or repeal the regulations. *See supra*, p. 13.

This line of demarcation between the domain of contract and of contractual obligations, on the one hand, and the domain of mandatory substantive public law and of public law obligations, on the other, recognizes the ordinary, common understanding of what constitutes a contract and a contractual obligation and what does not. And as this Court has long recognized the term "obligation of contracts" is to have its ordinary meaning rather than some idiosyncratic meaning. See *supra*, pp. 18-19.

The sum of the matter is, as the Court stated in *Cudahy Packing Co. v. Parramore*, *supra*, 263 U.S. at 423-24, that

> *Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract;* that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital —the one for the sake of the wages and the other for the sake of the profits. . . . Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment. . . .[19]

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[19] Several years earlier Roscoe Pound had presaged this understanding of the developing law:

> Even more significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. . . . These statutes have put jurists to

The Michigan Supreme Court is therefore entirely correct in its understanding that "Workers' compensation benefits are social-welfare income-maintenance benefits" akin to "unemployment compensation, social security, old age, disability, and survivors benefits, no-fault automobile benefits, aid to families with dependent children, and general assistance;" akin in other words to the prototypical "status" benefits. *Chambers*, 422 Mich. at 654, 375 N.W.2d at 723.[20]

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much trouble when they have sought to find a place for them in the legal system. Some have said that modern labor legislation creates a *status* of being a laborer, and this has frightened more than one court. For *status* is felt to be an archaic legal institution which we have outgrown. . . . Others have said that the duties and liabilities involved in workmen's compensation were quasi-contractual, which means only that the author did not know what to call them or where to place them. What is clear is that they are not contractual and that they do not accord with the modern principles of the law of torts. [Pound, *The End of Law As Developed in Juristic Thought*, 30 Harv. L. Rev. 201, 219-20 (1916) (emphasis in original).]

[20] Of course, if a state court or legislature were for some reason to indulge the fiction that a mandatory substantive obligation created by statute is nonetheless to be characterized as an obligation of contract—or, *per contra*, to characterize an obligation created by a voluntary promissory agreement as a public law obligation—its characterization could not serve to expand (or contract) the scope of the Contract Clause. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckswith*, 449 U.S. 155, 164 (1980). To that extent, petitioners are right that the question we have discussed in text is a pure question of federal law. Pet. Br. n.3, pp. 10-11. (Where, unlike here, the question of the nature of the obligation is not so clear, the State's characterization of the obligation is entitled to weight. *Phelps v. Board of Education*, 300 U.S. 319, 322-23 (1937); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1937).)

But while this is a federal question in the sense just stated, we note that the overwhelming majority of state courts that have confronted the question here have concluded that mandatory workers' compensation statutes create statutory obligations not contractual obligations. *See, e.g., Lester v. State Workmen's Compensation Comm'r*, 242 S.E.2d 443, 452 (W. Va. 1978) (collecting cases). Indeed the deviant view petitioners espouse—*viz.*, that the rights and obligations created by workers' compensation statutes

E. In opposition to all this petitioners offer three counters: the decision in *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865), which petitioners cite for the prop-

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are "contractual" in nature and origin—is an anachronism and is increasingly recognized as such by the state courts.

The view that workers compensation benefits are "contractual" can be traced to the early part of the 20th Century when a substantial majority of workers' compensation statutes were *elective* rather than *mandatory*. The permission to choose between the common law tort system and the statutory workers' compensation system was thought to impart the degree of voluntariness essential to "contractual" relations, and thus to make the choice of workers' compensation schemes a matter of free contracting. This was the rationale of the early Michigan cases, *see, e.g., Mackin v. Detroit-Timken Axle Co.*, 187 Mich. 8, 153 N.W. 49 (1915)—where the workers' compensation statute was elective until 1943—as well as in numerous other early decisions in jurisdictions with elective statutes.

Once workers' compensation statutes were amended to make coverage *mandatory*—and today there are only five elective states, 2A Larson, The Law of Workmen's Compensation, § 67-10 (1990 Supp.)—the retreat for the "contract" theory had been sounded. In West Virginia, for example, the decision in *Gooding v. Ott*, 87 S.E. 862, 77 W. Va. 487 (1916), embracing the "contract" approach was "expressly overruled" on this point in *Lester v. State Workmen's Compensation Comm'r, supra*, 242 S.E.2d at 450 n.13. The *Lester* court in a particularly thorough opinion termed the contract view of workers' compensation a "gross fiction" built on erroneous premises carried over from the early 20th Century case law. *Id.* at 447-50.

A long list of States have expressly abandoned their prior "contract" approach upon legislative action turning an elective into a mandatory system. *See, e.g., Ocean Accident & Guarantee Corp. v. Industrial Comm'n*, 32 Ariz. 275, 257 P. 644 (1927), *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952), *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986), *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495 (Iowa 1983), and *O'Quinn v. Walt Disney Productions, Inc.*, 177 Colo. 190, 493 P.2d 344 (Colo. 1972).

To be sure, at the time the fiction that workers compensation is "contractual" was adopted, that doctrine served the purpose of protecting fledgling workers' compensation statutes against *unsound* constitutional attack. The early cases adopting the "contract" approach were decided in the *Lochner* era when substantive due process was thought to pose an insurmountable barrier to economic and social legislation that restricted the ability of employers and

osition that "*quasi*-contractual" obligations are within the protective ambit of the Contract Clause; a line of cases holding the Contract Clause applicable to "implied" contracts; and a line of cases stating in a markedly different context that "the laws which subsist at the time and place of the making of a contract" are "incorporated in its terms." Pet. Br. at 10-16. None are remotely sufficient to the task.

1. Petitioners' reliance on *Joliffe* is misplaced. Contrary to their assertion, *Joliffe* was not a "Contract Clause decision[]." Pet. Br. at 11. Indeed, nowhere in the Court's opinion is the Contract Clause even mentioned. Rather, the central issue in *Joliffe* was whether an 1861 California statute regulating port pilotage was preempted by a federal statute covering the same subject matter. 69 U.S. at 459-63. And the portion of *Joliffe* to which petitioners would build a monument covered the following mundane, threshold question: whether a right to half fees for pilotage services offered and refused conferred by the 1861 statute was lost when, in the course of litigation by a pilot to enforce that right against a ship, the 1861 statute was repealed and replaced by an

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employees to contract freely. Thus, to uphold the constitutionality of workers' compensation statutes, courts resorted to the fiction that the parties' choice between the tort system and the workers' compensation system was a matter of "free contracting," and upheld the constitutionality of the statutes on that basis. *See, Lester v. State Workmen's Compensation Comm'r, supra,* 242 S.E.2d at 447-48.

We think it fair to say that these early decisions reflect a well-warranted dissatification with the substantive due process doctrine rather than principled analysis of the nature of contract or the nature of workers' compensation statutes. As already stated in the text, this Court in *New York Central R. Co. v. White, supra,* set matters straight by making it clear that mandatory workers' compensation statutes are constitutional exercises of the States' broad police powers *even though the statutes limit the parties' "freedom of contract." See supra* p. 15. After the *White* decision—and with the adoption of mandatory workers' compensation statutes—the dominant trend in the state courts has been to recognize the conceptual inadequacies of the "contract" fiction.

1864 California statute *that did not disturb or otherwise impair the right to such fees.*

The Court, in concluding that the right continued, began by stating that the transaction in question—*viz.* the offer of services by the pilot and the refusal by the ship—"*cannot be strictly termed a contract*, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract;" the case therefore did not come within the rule that penalties imposed by statute do not survive the statute's repeal. 69 U.S. at 457-58 (emphasis added).

The Court then confronted the critical question of legislative intent straight on rather than through any general rule for ascertaining the legislature's presumed intent and found that "the Legislature did not intend by the repealing clause in the Act of 1864, to impair the right to fees" because the "new Act re-enacts substantially all the provisions of the original Act" and is " 'to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones.' " 69 U.S. at 458 (quoting *Wright v. Oakley*, 5 Met., 406.)[21]

Thus, *Joliffe* is at two removes from this case; *Joliffe* had nothing to do with the Contract Clause and nothing to do with any contractual transaction. To the extent that there is even the slightest implication in *Joliffe* that a "quasi-contractual" obligation is within the protective ambit of the Contract Clause—and we do not believe that there is—that implication can *not* be squared with the law of contracts as generally understood or with this Court's Contract Clause cases defining the terms "con-

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[21] In view of this holding, *Joliffe* has recently been cited by the Court as in "[a]ccord" with the proposition that " '[n]otwithstanding . . . formal repeal [of an old act stating a certain obligation] it is . . . entirely correct to say that the new act [stating the same obligation] should be construed as a continuation of the old.' " *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 246 n.18 (1985) (quoting *Bear Lake and River Water Works and Irrigation Co. v. Garland,* 164 U.S. 1, 11-12 (1896)).

tract" and "contractual obligation" as used therein. *See supra*, pp. 16-20. It is significant in this regard that two of these *true* Contract Clause cases—*Garrison v. New York*, *supra*, and *Louisiana ex rel. Folsom v. New Orleans*, *supra*—*postdated Joliffe* and were written by *Joliffe's* author, Justice Field.[22]

2. According to petitioners this Court has applied Contract Clause analysis to "terms of employment implied from state statutes."[23] The cited cases, however, did *not* involve state enactments that regulate relationships between private parties. To the contrary, each involved a state statute setting out the terms of an *implied-in-fact* employment contract *between the State acting in its proprietary capacity as employer and state employees*. *See Fisk v. Jefferson Police Jury*, 116 U.S. at 132-34; *Mississippi ex rel. Robertson v. Miller*, 276 U.S. at 178-79; *Indiana ex rel. Anderson v. Brand*, 303 U.S. at 100.

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[22] Petitioners' attempt to convert the statutory obligations created by the Michigan workers' compensation law into "contractual obligations" is in vain, moreover, *even if Joliffe* could be read for the proposition that the Contract Clause prohibits the impairment of quasi-contractual obligations as well as true contractual obligations. This is so because the obligations created by the Michigan workers' compensation statute are even further removed from true contractual obligations than are quasi-contractual obligations.

Quasi-contractual obligations share one attribute of true contractual obligations in that quasi-contractual obligations are enforceable in a common law breach of contract or "assumpsit" action. *See supra* n.17, pp. 18-19. The obligations created by the Michigan workers' compensation statute, in contrast, share *none* of the attributes of true contractual obligations, since these statutory obligations are enforceable *only* in administrative proceedings, the contours of which are specified by statute. *See supra* p. 1.

Nothing in *Joliffe* or any other decision of this Court remotely suggests that obligations that are *neither* created by the voluntary exchange of promises *nor* enforceable in a common law breach of contract action can be treated as "obligation[s] of contracts" within the meaning of the Contract Clause.

[23] *See* Pet. Br. at 12-13 & n.4 (citing *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885); *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 179 (1928); *Indiana ex rel. Anderson v. Brand*, *supra*).

The employment contracts at issue in these cases were no different in kind from those implied-in-fact employment contracts that arise with great frequency in the private sector when an employer publishes terms and conditions of employment and employees agree to those terms and conditions by beginning to work. Nor, for that matter, are the implied-in-fact employment contracts in this Court's precedents different in kind from the implied-in-fact contracts which arise when, for example, "A telephones to his grocer, 'send me a ten-pound bag of flour.' The grocer sends it. A has thereby promised to pay the grocer's current price therefor." Restatement, *supra*, § 4, Illustration 1.

As we have shown, implied-in-fact agreements are true contracts entitled to full protection under the Contract Clause. *See supra* n.16, p. 17. And where a State is one of the parties to such an implied-in-fact agreement the conclusion that a contract and contractual obligations governed by the Contract Clause result can be fairly derived from the general law of contracts. But it most emphatically does *not* follow that *mandatory government regulation of the employment relationship between a private employer and a private employee* creates a contract and contractual obligations governed by the Contract Clause.

3. Ultimately, petitioners fall back on the oft-cited principle, first stated by the Court in *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867), that "the laws which subsist at the time and place of the making of a contract" are "incorporated in its terms."

In *Von Hoffman* itself, however, it is expressly noted that this "incorporation" principle applies *only* to those laws "*which affect* [*the contract's*] *validity, construction, discharge, and enforcement.*" *Id.* (emphasis added). *Accord United States Trust Co. v. New Jersey*, 431 U.S. 1, 19-20, n.17 (1977) (*Von Hoffman* principle applies to laws "pertaining to the interpretation and enforcement" of contracts).

Von Hoffman is thus grounded on the notion that a "contract" does not exist—at least from a legal standpoint—unless the law recognizes the validity of the contract and provides means for its enforcement and, has been applied to cases in which state legislatures have repealed *preexisting statutory remedies* for breach of contract.[24] Such repeals have been held to "impair the obligation of contracts" because "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist. . . . The ideas of validity and remedy are inseparable . . . ." *Von Hoffman*, 71 U.S. at 552.[25]

Although the *Von Hoffman* line's *results* are unexceptionable, we would be derelict if we failed to emphasize the deficiency in its reasoning. As Corbin puts the point:

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[24] A number of these cases are set forth in petitioners' brief. *See* Pet. Br. at 13 & n.4.

[25] This poi[illegible]at the heart of the cases in which the Court has invoked th[illegible] *Hoffman* principle to invalidate state legislation repealing [illegible]sting statutory remedies for breach of contract. *See, e.g., W.B. Worthen v. Kavanaugh*, 295 U.S. 56, 60 (1833); *W.B. Worthen v. Thomas*, 292 U.S. 426, 432 (1934); *Coombes v. Getz*, 285 U.S. 434, 442-44 (1932); *Douglas v. County of Pike*, 101 U.S. 667, 687 (1880); *Edwards v. Kearzney*, 96 U.S. 595, 600 (1877); *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314, 316-17 (1873).

One of these cases, *Coombes v. Getz*, relies in part on the Court's opinion in *Joliffe, supra*; and, thus, its *dicta* suggests a holding based on somewhat broader grounds. Upon analysis, however, *Coombes* falls squarely within the *Von Hoffman* line of cases. The plaintiff creditors in *Coombes* were the assignees of a sales contract with a corporation upon which a debt was owed. 285 U.S. at 439. The remedy available to the creditors to recover this contract debt was a cause of action against the directors of the corporation provided by state law. *Id.* When California repealed this cause of action during the course of the litigation the State effectively deprived the creditors of the essential means of enforcing their sales contract with the corporation, and thus "impaired" that sales contract within the meaning of *Von Hoffman* and its progeny. *Id.* at 442-44.

> Does the Constitution therefore deprive a State of legislative power to alter or repeal its *remedial* statutes for the enforcement of contracts? With respect to already existing contracts, the answer has been to some extent in the affirmative; and a reason often given is that such statutes are incorporated in and form a part of the contracts. *The reason as thus stated is bad; but the result reached may be sound and correct.* The legal relation of right and duty exists only by virtue of legal remedies for enforcement. A total destruction of remedy is a denial of "right." Thereafter "obligation," in any reasonable sense of the term, does not exist. [Corbin, *supra*, *The Law of Contracts*, § 551, at 199-200 (emphasis added)].[26]

Certainly, then, nothing in the *Van Hoffman* line of cases justifies a fiction that creates contractual obligations not out of voluntary promissory expressions but out of a mandatory public law.[27]

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[26] *See also Ogden v. Saunders*, 25 U.S. (12 Wheat) 213, 316-18 (1827) (Trimble, J., concurring) ("[T]he obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of the contracts. . . . The obligation does not inhere, and subsist in the contract itself, proprio vigore, but in the law applicable to the contract."); Story, *Commentaries on the Constitution of the United States*, §§ 1372, 1378, at 243-44, 248-50 (1970 ed.) (same); Williston, *supra*, § 615, at 605.

[27] Petitioners' reliance on *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922), has no basis in that decision. The Court there simply quoted without comment or approbation a passage from an early New York decision suggesting that the New York workers' compensation statute "is read into and becomes a part of the [employment] contract." *Id.* at 271 (quoting *Doey v. Howland Co.*, 224 N.Y. 30, 36, 120 N.E. 53, 54 (1918)). This suggestion by the New York Court did not enter into this Court's decision, as reflected by the Court's holding that federal maritime law did not preempt application of the state workers' compensation statute to accidents occurring on a pier "whether [workers' compensation] awards under the act are made as upon implied agreements *or otherwise*." 259 U.S. at 276 (emphasis added).

Significantly, the New York decisions subsequent to *Doey v. Howland* have *rejected* the suggestion therein that workers' compensation is a matter of "contract." As the New York Court held

II. If Petitioners Had a "Contractual Obligation" to Pay Workers' Compensation Benefits to Respondents, That Obligation Was Perfected on the Dates of Respondents' Injuries and Was Vindicated, Rather than Impaired, by the 1987 Michigan Statute

Petitioners are insistent that their acknowledged obligation to pay workers' compensation benefits to respondents is not a statutory obligation but a contractual obligation. Indeed, that insistence is the necessary predicate for petitioners' claim that their "contractual obligation" to respondents was "impaired" by the 1987 Michigan statute in violation of the Contract Clause.

Nonetheless, petitioners neglect—undoubtedly through sheer inadvertence—to specify either the time at which this "contractal obligation" was assumed or its specific content. In this section of our Argument we indulge petitioners' legal theory that their workers' compensation obligations are "contractual obligations" and having done so we turn to the task of filling in these voids in petitioners' discussion of their theory.

As we demonstrate below, it is clear that if workers' compensation contracts existed between petitioners and respondents, petitoners' contractual obligations were fixed *on the dates of respondents' injuries* and were subject to the laws in effect *on those dates.* That being so, it is equally clear that when the 1987 Michigan Legislature enacted curative legislation compelling petitioners to pay workers' compensation benefits to respondents *in accordance with the laws in effect on the dates of respondents' injuries*, the Legislature in no way "impaired" petition-

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in rejecting a Contract Clause challenge to a statutory amendment increasing workers' compensation benefits for workers injured both before and after the amendment: "Liability under the Workmen's Compensation Law does not arise out of contract. That liability has its origin not in contract but in legislative fiat decreed in accordance with constitutional mandate and hence does not violate the contract clause of the United States Constitution." *Schmidt v. Wolf Contracting Co.*, 55 N.Y. Supp. 2d 162, 169 (1945), *aff'd*, 295 N.Y. 748, 65 N.E.2d 568 (1946).

ers' contractual obligations to respondents. To the contrary, *the Legislature vindicated the "contracts" at issue* by holding petitioners to their "contractual obligations".

A. (1) When the "contract" theory of workers' compensation previously held sway in Michigan, *see supra* n.23, p. 23, the Michigan Supreme Court held that the

> "law which must control the [workers'] compensation to be paid is that which was in effect at the time the right to the compensation springs into existence." That right arose at the time of the injury . . . . [*Tarnow v. Railway Express Agency*, 331 Mich. 558, 563, 50 N.W.2d 318, 321 (1951) (quoting *Thomas v. Continental Motors Corp.*, 315 Mich. 27, 36, 23 N.W.2d 191, 194 (1946)).]

And, so far as our research shows, *every* jurisdiction that has at one time or another accepted the "contract" theory of workers' compensation has recognized this "time of injury" rule.[28]

(2) The judicial precedents holding that where there is a contractual obligation to pay statutory workers' compensation benefits the obligation becomes fixed at the time of injury are entirely consistent with the branch of the law of contracts covering aleatory promises—*viz.*, a promise the performance of which is by its own terms

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[28] *See, e.g., Harris v. National Truck Service*, 56 Ala. App. 350, 354, 321 So.2d 690, 693-94 (1975) ("It is a controlling feature that workmen's compensation is of a contractual nature. Alabama has adopted the majority rule that the legislature is free to change the provisions of a compensation law up until the time of injury. However, because the employer and employee have implicitly contracted to abide by the compensation scheme in effect at the moment of injury, any attempt to amend the compensation schedule after the injurious accident can have no bearing on the award given . . ."); *Phillips v. City of West Palm Beach*, 70 So.2d 345, 346 (Fla. 1953); *Mitchell v. United States Fidelity and Guaranty Co.*, 206 F. Supp. 489, 590 (E.D. Tenn. 1962); *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 648-49, 256 S.E.2d 692, 700 (N.C. 1979); *Cooper v. Wicomico County*, 278 Md. 596, 600, 366 A.2d 55, 57 (Md. 1976); *Horton v. Fleming Co.*, 3 Kan. App.2d 121, 590 P.2d 594, 596 (Kan. Ct. App. 1979) app. denied 225 Kan. 844 (1979).

subject to the happening of an uncertain and fortuitous event, *Corbin*, *supra*, § 728, at 684—as commonly understood. This is confirmed by the passage from this Court's opinion in *Fisk v. Jefferson Police Jury*, *supra*, quoted at length in Pet. Br. at 12-13.

As discussed earlier, *Fisk* involved an implied-in-fact employment contract between a State in its proprietary capacity as employer and a public employee who had rendered services on behalf of the State. *See supra*, pp. 26-27. In holding that the State was barred by the Contract Clause from disclaiming its obligation to compensate the public employee for services *previously rendered*, the *Fisk* Court found that an implied-in-fact contract "to make compensation" is "*a completed contract* [*whose*] *obligation is perfect*" when the other contracting party has delivered property, paid money, rendered service, *or suffered loss at the request of or for the use of another.*" *Fisk*, 116 U.S. at 134 (emphasis added).

As *Fisk* makes clear, petitioners' "contractual obligation" to pay workers' compensation benefits to respondents was fixed and immutable at the time at which respondents "suffered loss at the request of or for the use of" petitioners; *viz.*, on the dates of respondents' injuries.

B. Although what we have said thus far is, we believe, dispositive of the matter, we would be remiss if we failed to note that our position is buttressed by the very argument offered by petitioners in support of their claim that the obligations created by workers' compensation statutes should be treated as if the statutes were "incorporated into" employment contracts.

According to petitioners, the "incorporation" principle makes sense in this context because it is commonplace for employers and employees to "bargain around" workers' compensation statutes in negotiating the terms of their employment contracts by, e.g., "bargain[ing] for enhanced disability benefits or . . . by decreasing pension or insurance benefits to take account of workers' compensation levels." Pet. Br. at 15.

On petitioners' theory, then, respondents here presumably suffered a diminution of benefits in other areas, such as wages, pensions, and insurance, to account for the fact that at all times prior to their injuries *their employers could not as a matter of Michigan law coordinate workers' compensation benefits.* By petitioners' hypothesis in other words, there was an "overall bargain" whereby respondents agreed to accept less in the way of "pension or insurance benefits" in return for higher workers' compensation benefits in the event that their employment was prematurely terminated by injury.[29]

If petitioners could reduce workers' compensation benefits after the date of injury *respondents* would, of course, *be denied* their part of this bargain.

C. Since petitioners so assiduously avoid any specifics on their "contractual obligation" to pay workers' compensation benefits to respondents, we can only hazard the following guess on how petitioners can say that the 1987 Michigan Act "impaired" that obligation: The 1987 statute prohibiting the coordination of benefits for workers injured prior to 1982 repealed the 1981 statute that, as interpreted by the Michigan Supreme Court, allowed such coordination. That being so, the 1981 statute allowing the coordination of benefits had been "incorporated into" the contracts of employment between petitioners and respond-

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[29] The economic literature is to the effect that the pension benefits nominally "financed by the employer" (and asserted to be subject to coordination here) are in truth payments of deferred compensation previously earned by the employees, at the cost of less in the way of current compensation. *See* Bernstein, *The Future of Private Pensions*, 118-131 (1965); McGill, *Fulfilling Pension Expectations*, 164-165 (1962); Schiller and Weiss, *Pensions and Wages: A Test For Equalizing Differences* (Rev. November, 1978, funded by the U.S. Administration of Aging and the U.S. Department of Labor and University of Maryland's Computer Science Center). The latter paper states that, "More generous pension provisions are offset by lower wage rates, i.e., that equalizing differences operate across the different dimensions of total compensation." (Abstract).

ents and the 1987 repeal impaired the obligation of those contracts.

The obvious flaw in the foregoing is that when the 1981 statute was enacted the "contracts" between petitioners and respondents for the payment of workers' compensation benefits had, to use the words of *Fisk*, already become "completed contract[s]" whose "obligation is perfect". *Supra* p. 32. Thus the 1981 statute permitting coordination could only be incorporated in these contracts by impairing the perfected contractual obligation to pay "uncoordinated" benefits.

Equally to the point, since petitioners' argument is that workers' compensation is contractual on the theory that workers' compensation statutes are incorporated in the employer-employee contract of employment, petitioners have the following dilemma: by the time the 1981 Act became law *both Mr. Romein and Mr. Gonzalez had retired; neither was working for petitioners and neither had any employment contract with petitioners into which to incorporate the 1981 statute.* Indeed, since the "coordination" dispute relates to the retirement benefits of workers injured prior to 1982, by definition the entire affected class consists of retirees who had no employment contracts into which the 1981 Act could be incorporated. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-74 (1972).

Petitioners contract-impairment claim is thus at war with the very "incorporation" theory that is its foundation. What petitioners are arguing is that the workers' compensation statute in effect at the time of respondents' injuries, which did *not* allow for the coordination of benefits, was *displaced* as part of the parties' employment contracts by the 1981 statute allowing coordination.

But the "incorporation" principle by its terms provides that the law in effect *at the time of contracting* controls. If laws enacted *subsequent* to the formation of a contract somehow operate to displace the laws previously incorporated therein, then the "incorporation" principle is utterly incoherent even on its own terms.

Under such a line of reasoning each successive amendment to Michigan's workers' compensation laws would displace the laws previously incorporated in the affected parties' pre-existing employment contracts, *including* the 1987 statute prohibiting the coordination of benefits for workers injured prior to 1982. And under such a line of reasoning petitioners' contract-impairment claim must fail.

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The crux of the matter is this: If any "impairment" of any "contractual obligation" occurred in the course of the events culminating in this litigation, that impairment was effected when the 1981 Michigan Legislature enacted amendments to the workers' compensation statute that, as interpreted by the Michigan Supreme Court, permitted employers to coordinate the workers' compensation benefits due to *workers injured prior to the 1981 amendment's effective date; workers whose pre-existing "contracts" for the payment of benefits did not allow for coordination.*

The amendment enacted by the 1987 Michigan Legislature to cure this impairment was *not* in itself an impairment of the "contractual obligations" petitioners had previously assumed at the time of respondents' injuries. Quite to the contrary, the 1987 Act did nothing more than require petitioners *to honor the "contracts" at issue according to their terms under the law as it stood at the time the contracts were negotiated and consummated and to disgorge the improper windfall petitioners had gained in the interim by dishonoring the contractual obligations they had undertaken to fulfill.*

Because petitioners could *not* reasonably have expected to be *relieved* of their contractual obligations by legislation postdating the consummation of their contracts, petitioners cannot in good conscience complain that legislation *restoring* those obligations amounted to a violation

of the Contract Clause. *El Paso v. Simmons*, 379 U.S. 497 (1965).

III. If Petitioners Had a "Contractual Obligation" to Pay Benefits to Respondents, and That Obligation Was Adversely Affected by the 1987 Michigan Statute, It Is Clear Under This Court's Decisions That There Was No Substantial Impairment of a Contractual Obligation in Violation of the Contract Clause

At this juncture—and disregarding our showing thus far—we assume that petitioners had a "contractual obligation" to pay workers' compensation benefits to respondents *and* that this obligation is measured by the 1981 Michigan statute as construed by the Michigan Supreme Court *and* that the 1987 Michigan statute increased this obligation. We show that, even assuming all this, petitioners' Contract Clause claim must fail under the well-established standard for testing such claims most recently outlined by a unanimous Court in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983).

A. (1) The first prong of the *Energy Reserves Group* test requires a determination of "whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship." 459 U.S. at 411 (emphasis added). If there has been no such *substantial impairment* then the Contract Clause inquiry is at an end and the remaining prongs of the test need not be considered. *Id.* at 421 (Powell, J. concurring) (joined by Chief Justice Burger and (then) Justice Rehnquist).

With regard to the substantiality of the alleged impairment in this case, two points are of particular significance. *First*, as Justice Powell emphasized in his concurring *Energy Reserves Group* opinion, there is "*no* substantial impairment of [a party's] contractual rights" where the party's "*reasonable* expectations have not been impaired by the [state regulation in question]." 459 U.S. at 421 (emphasis added). *Accord United States Trust Co., supra*, 431 U.S. at 19 n.17. *Second*, the question of whether a change in state regulation has defeated reasonable expectations depends in part on whether the parties entered into their contractual relationship at a time when such relationships were already subject to pervasive state regulation. *Energy Reserves Group*, 459 U.S. at 411.

(2) Given these two points, it is manifest that the 1987 Michigan statute did not work a "substantial impairment of [petitioners'] contractual rights."

As an initial matter, employers in Michigan have for decades conducted their business affairs with an understanding that the level of workers' compensation benefits to be paid to workers injured in their employ *is a matter within the sole discretion of the Legislature* and that the Legislature has from time to time altered benefit levels "retroactively" where that has been deemed necssary to achieve a just balance between the legitimate interests of employers and employees. Indeed, since all these alterations have improved benefits, the employers were on notice that it would be imprudent to conduct their affairs on the supposition that their workers' compensation costs would remain fixed. The Michigan workers' compensation law on its face, moreover, forecloses any reasonable expectation that the payment of workers' compensation benefits is a final transaction by providing that such a payment can *not* be deemed a "determination of the rights of the parties under this act." *See supra*, p. 2.[30]

Thus, in the leading Michigan case of *Lahti v. Fosterling, supra*, the Michigan Supreme Court upheld the application of a statutory amendment to the workers' compensation law, eliminating a durational limit on medical reimbursement benefits and applying that rule to injuries arising before the effective date of the amendment. The Michigan Court emphasized that "the subject matter of workmen's compensation reposes within the control of the legislature" and that the "humanitarian purpose[]" of workers' compensation legislation is to provide work-

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[30] The "one year back rule" relied on at Pet. Br. 21, was inapplicable, even before the 1987 Act, under case law permitting a correction of benefit rates. *Mowrey v. Motor Wheel Corp.*, 1961 WCABO 463.

ers with just compensation for employment-related injuries. 357 Mich. at 592, 99 N.W.2d at 497. Accordingly, that Court found that the Michigan Legislature was at liberty to adjust workers' compensation benefits "retroactively" if in the judgment and discretion of the Legislature the purposes of the statute would be furthered thereby. 357 Mich. at 593, 99 N.W.2d at 499. *See also* the cases collected *supra* n.1, p. 2.[31]

In the particular circumstances of this case, moreover, any expectations petitioners may have had that the 1981 Act as construed in *Chambers* accomplished a complete and final accounting of their workers' compensation obligations to the respondents were even more unreasonable than the preceding Michigan authorities would suggest.[32]

Almost immediately after the 1981 Act was passed, both houses of the Michigan Legislature adopted a resolution stating that it had *not* been their intention "to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits

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[31] The Michigan Supreme Court decision that prompted the Michigan Legislature to pass the 1987 statute challenged by the petitioners is itself but another instance in which the Michigan Court has upheld a "retroactive" adjustment of workers' compensation obligations previously incurred. In that case the Michigan Court stated: "Workers' compensation benefits are social-welfare income-maintenance benefits. . . . In providing for such benefits, the Legislature did not covenant not to amend the legislation." *Chambers*, 422 Mich. at 654, 375 N.W.2d at 722-23.

[32] In light of the nature of workers' compensation benefits and the pervasive regulation of that subject matter by the Michigan Legislature, petitioners' assertion that "[t]he substantial impairment of employers' contractual expectations in this case is closely analogous to that held unconstitutional in *Allied Steel*" (Pet. Br. at 19) cannot withstand a moment's scrutiny. *Cf. Allied Steel, supra*, 438 U.S. at 250 (Minnesota law increasing contractual obligations voluntarily undertaken by employer under negotiated pension plan is infirm under Contract Clause because, *inter alia*, "it did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State").

resulting from the injuries incurred prior to the act's effective date." *Supra* at p. 5. In the face of these resolutions, General Motors and Ford, virtually alone among Michigan employers, took a remarkably aggressive stance: General Motors and Ford *unilaterally* coordinated the benefits *already due and owing to injured workers*. General Motors' and Ford's actions were challenged immediately and, until the decision of the Michigan Supreme Court in *Chambers* which issued in late December 1985, were consistently found unlawful at both the administrative and judicial levels. *Supra* at pp. 5-6. The *Chambers* result itself was deemed "harsh and unforseen" by its author on a petition for rehearing. *Supra* at p. 8. And, not surprisingly, legislative initiatives to overturn *Chambers* followed immediately on the heels of that decision. *Supra* at pp. 8-10.

The foregoing makes it abundantly clear that at no point during the period from 1981 to 1987 did petitioners have a *reasonable basis* for the expectation that the Michigan Legislature—the body with final decisionmaking authority over the level of workers' compensation benefits to be paid to injured workers, *supra* at pp. 1-2—had conclusively decided to permit coordination of benefits for workers injured prior to 1982.[33] As the court below

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[33] The same is true for *amici curiae* insurance carriers, who similarly profess reasonable reliance on an immutable state of affairs with respect to coordination. In the first place the *insurance contract* between the carriers and their policyholders was *not* the contract claimed below to have been impaired. There is, moreover, every reason to believe that the carriers set up reserves based on the liabilities created *at the times of injury* and *under the law applicable* when Messrs. Romain and Gonzalez and similarly situated workers became disabled. Third, the case law makes clear that insurance carriers and their policyholders cannot immunize themselves from later, otherwise valid legislation by locking themselves into contractual arrangements contrary to such legislation. *Todd Shipyard Corp. v. Witthuhn*, 596 F.2d 899 (C.A. 9, 1979); *Colonial Penn Insurance Co. v. Heckler*, 721 F.2d 431 (C.A. 3, 1983). Indeed, the insurance policy appended to the brief of the *amici curiae* (at p. 1a) indicates an agreement to pay for liabilities under subsequent statu-

stated: "[T]he employers were on notice of the legislative debate regarding the proposed changes in the law. Reliance on an area of the law that is in a state of flux is not reasonable reliance." Pet. App. 11a-12a.

B. The second and third prongs of the *Energy Reserves Group* test require that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation," and that the regulation must make an "adjustment of the 'rights and responsibilities of contracting parties [based] upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption.'" 459 U.S. at 411-12 (citing *United States Trust Co., supra*, 431 U.S. at 22; *Allied Structural Steel Co., supra*, 438 U.S. at 247, 249). These two requirements are easily met by the 1987 Michigan statute.

The obvious—and obviously sufficient—public purpose of the 1987 Michigan statute was to ensure that employees who had been injured prior to 1982 and who were receiving workers' compensation awards based on those injuries *would not suffer the unprecedented, "harsh and unforeseen" diminution in their benefits* that resulted from the *Chambers* decision.

But there is much more. On petitioners' own theory, there is every reason to believe that the workers who were injured prior to 1982 received *lower wages and benefits* during the course of their working years, and *lower pensions*, than they would otherwise have received if the law in effect on their injuries had allowed for the coordination of workers' compensation benefits. *Supra* at pp. 32-33. And, as the Michigan Supreme Court emphasized, "these employees were not entitled [to share in] the overall increase of [workers' compensation] benefits provided for those [employees] injured after 1982." Pet. App. 17a.

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tory amendments. This Court has held that under such circumstances there is no impairment under the Contract Clause. *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934).

Thus, had the 1987 Michigan Legislature allowed the decision in *Chambers* to stand, these workers would have been "double-sufferers." Certainly, the effect of the 1987 statute is not, as petitioners would have it, to enable these workers to become "double-dippers." [34]

Most to the point, the foregoing is more than sufficient to show that it was well within the Michigan Legislature's legitimate prerogative to judge for itself the equities of the competing claims in this situation and to determine that the equities favored the workers who lost expected benefits and not the employers who gained a temporary windfall. *See Energy Reserves Group*, 459 U.S. at 412-13 ("Unless the State itself is a contracting party . . . 'as is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'") (quoting *United States Trust Co., supra*, 431 U.S. at 22-23).

Finally, there can be no question but that the means chosen by the Michigan Legislature to effectuate these purposes were reasonable. As discussed, the Legislature's principal purpose was to ensure that there would be no retroactive decrease in workers' compensation benefits for workers whose entitlement to those benefits had already arisen. To accomplish this end, the Legislature provided that all employers would be precluded in the future from coordinating benefits for workers who had been injured prior to 1982, *and* that those few employers (like petitioners) who had coordinated benefits in the meantime would be required to disgorge their windfall gains. As the Michigan Supreme Court held, the statute as thus drafted

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[34] Indeed, if the Michigan Legislature had not required the *minority* of employers who had unilaterally repudiated their pre-1981 commitment to pay full ("uncoordinated") workers' compensation benefits to workers injured up to that time, one of two inequitable consequences would have come to pass: the minority would have *gained a cost advantage* over the majority who had met their pre-1981 commitments; or, to avoid that anticompetitive result, the majority would have had to be given a right of recoupment against workers injured prior to 1981.

"impose[d] no more retroactive liability than [was] necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." Pet. App. at 17a.

IV. The Court Should Reject the Invitation to Remake Its Contract Clause Jurisprudence to Conform to Petitioners' "Original Understanding" Version of the Clause

Petitioners entreat this Court "to restore" the Contract Clause to "its proper place in the constitutional structure." Pet. Br. at 28. Petitioners argue that this act of restoration can be accomplished simply by reading the prohibition on "impairing . . . the obligation of contracts" in a literal way. That language so read, petitioners say, calls for an "absolute" approach and forecloses "the kind of balancing test employed in the Court's modern decisions" beginning with *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and continuing through *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987). Pet. Br. at 30. Petitioners' call for a new Contract Clause jurisprudence is wholly unpersuasive.

A. There is, first of all, the small matter of a long line of contrary precedent. As the Court stated in *Vasquez v. Hillary*, 474 U.S. 254, 265-66 (1986): "While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" (Quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).) Petitioners have not even begun to make the special showing required for a departure from *stare decisis*.

The Court's decision in *Home Building & Loan Ass'n v. Blaisdell*, *supra*, has been on the books for over half a century. In that time, *Blaisdell* has become the centerpiece of this Court's Contract Clause jurisprudence *and has been repeatedly reaffirmed by this Court*. Within

the past fourteen years alone the Court has decided five Contract Clause cases that have accepted and applied the *Blaisdell* balancing test without dissent, and that have explicitly rejected the approach advocated by petitioners.[35]

Equally to the point, neither "experience" nor "facts newly ascertained," *Vasquez v. Hillery*, *supra*, 474 U.S. at 266, merit a reexamination of the foregoing line of decisions. This is *not* a situation in which experience has shown the Court's decisions unworkable or deleterious to the Republic. Nor is it a situation where newly-discovered historical evidence demands a restructuring of the constitutional landscape.

In this regard it is highly significant that the major works collecting and reviewing the historical materials relevant to understanding the Contract Clause were published decades before the recent decisions of this Court reaffirming *Blaisdell* and were thus before the Court for its mature consideration at the time of those decisions. *See, e.g.*, B. Wright, *The Contract Clause of the Constitution* (1938); Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 512 (1944).[36] And, the authors

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[35] Most recently, the Court stated in *Keystone Bituminous Coal Ass'n*, *supra*, 480 U.S. at 503:

> [I]t is to be accepted as commonplace that the Contract Clause does not operate to obliterate the police power of the States. ("It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.") [quoting *Allied Structural Steel Co.*, *supra*, 438 U.S. at 241 and *Manigault v. Springs*, 199 U.S. 473, 480 (1905)].

See also United States Trust Co., *supra*, 431 U.S. at 22; *Allied Structural Steel Co.*, *supra*, 438 U.S. at 240; *Energy Reserves Group*, *supra*, 459 U.S. at 410; *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. at 190.

[36] In *Allied Structural Steel Co.*, *supra*, for example, both the majority and the dissent drew from these sources. *See* 438 U.S. at 240-41 nn. 10, 12; *id.* at 256-57 (Brennan, J., dissenting).

of the more recent articles put forward by the petitioners do not purport to have discovered any "new" evidence that proves petitioners' point beyond any doubt. Even those commentators are compelled to acknowledge that the history of the Contract Clause is sparse and largely unilluminating.[37]

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[37] The one fact on which all agree is that the proposal to add the Contract Clause to the Constitution engendered minimal debate and discussion during the course of the constitutional convention and the ratification process. *See, e.g.*, McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 276-81 (1988) (cited in Pet. Br. at 32); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L. Q. 525, 532-34 (1987) (cited in Pet. Br. at 31); Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case West. Res. L. Rev. 597, 600 (1987) ("The origins of the Contract Clause are 'shrouded in mystery.'") (citation omitted).

What limited evidence there is of the Framers' "original understanding" is inconclusive at best. The commentators state that the birth of the Contract Clause can be traced to a proposal by Rufus King to add the following words of the Northwest Ordinance of 1787 to the Constitution: "no law ought ever to be made . . . that shall, *in any manner whatever*, interfere with or affect private contracts." 2 Records of the Federal Convention of 1787, at 439 (Ferrand, ed., 1937) (emphasis added).

After brief discussion about the potential breadth of such a clause and tentative approval of a modified proposal by the Convention, the Clause went to the Committee on Style, which reported back significantly redrafted language: "No state shall . . . pass . . . laws *altering or impairing* the obligation of contracts." 2 *Farrand*, at 596-97 (emphasis added). Two days later, the Clause was modified further to read, "No state shall . . . pass . . . laws impairing the obligation of contracts." *Id.* at 619 (emphasis added). The deliberations by the Committee on Style were not recorded. It is thus impossible to know for certain the motivation underlying the Committee's modifications to the language of the Northwest Ordinance.

But this much can safely be said: Considering the paucity of debate over the language that ultimately emerged from the Committee, the evolution of that language and the open-textured nature of the term "impairing," the fair inference is that the Framers did *not* intend the far-reaching incursion into the States' legislative authority that petitioners surmise.

Petitioners' "original understanding" presentation is thus nothing more than a restatement of a position that has already been subjected to a searching examination by the Court on many occasions and found wanting on each such occasion.

B. The logic of petitioners' argument for an absolute approach to the Contract Clause is no stronger.

(1) The proposition that the Contract Clause should be read literally to impose an absolute bar to the "impair[ment of] the obligation of contracts" has, to be sure, a beguiling air of simplicity and certainty to it; according to petitioners, all that one has to do is read the literal language of the Contract Clause and the results in cases arising under that Clause are immediately transparent. The reality of the situation, however, is far different.

This reality is driven home by petitioners' attempt to distinguish between state laws that are "purely retroactive"—and which, according to petitioners, are contrary to the Contract Clause *per se*—and state laws that "contain elements of both retroactivity and prospectivity," *viz.*, laws that are retroactive in the "secondary" or "weak" sense—and which, according to petitioners, are *not* necessarily contrary to the Contract Clause. Pet. Br. at 33-34. On the basis of this distinction we are told that *Blaisdell* and its progeny were wrongly decided but that *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877) and its progeny were correctly decided. *See* Pet. Br. at 34-36.

The purported distinction between these two sets of state laws altering contractual obligations can *not* possibly be discerned by parsing the literal language of the Contract Clause, which speaks in unitary terms of "impair[ments] [of] the obligation of contracts." Nor does this distinction follow from the Contract Clause's purpose to protect bargained-for expectations: For example, if a party enters into a long-term contract for the distribution of beer, and makes the necessary investments to honor that contract in reliance on the fact that the laws in effect at the time of contracting permit the distribution of beer, the party's

bargained-for expectations will be defeated no less, albeit constitutionally, if the State enacts a statute prohibiting the distribution of beer during the term of the contract. *Cf. Beer Co. v. Massachusetts, supra.*

In the final analysis, then, petitioners offer no basis for distinguishing among the various types of state laws altering or otherwise affecting "the obligation of contracts" *other than the need to balance the police power of the States against the reasonable expectations of contracting parties. See* Pet. Br. at 35-36. But this is the very balancing of interests that petitioners contend is, and should be, foreclosed by the Contract Clause's literal language. *Id.* at 34.

(2) Petitioners seek to create the impression that enshrining the Contract Clause's "original understanding" in this Court's jurisprudence is a minor adjustment whereby the word "impair[ment]" is read as saying that retroactive state legislation adding to, or subtracting from, a contractual obligation is absolutely prohibited. But, even assuming that petitioners' suggestion had merit on its own terms, it must be pointed out that petitioners' request to restore the "original understanding" of the Contracts Clause is, at best, selective and, beyond that, self-serving.

Thus, the very authorities on which petitioners rely have contended that the entirety of this Court's Contract Clause jurisprudence, beginning with *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) is built upon a foundation that is unfaithful to the Framer's "original understanding." [38]

[38] *See, e.g.*, Kmiec & McGinnis, *supra*, at 539 ("Chief Justice Marshall's attempt [in *Fletcher*] to subject all executed conveyances to scrutiny under the Contract Clause through the bald assertion that a 'grant is a contract executed' is theoretically problematic, and ultimately contrary to the original understanding of the Clause. . . . The Marshall Court also may have erred [in *Dartmouth College*] in expanding the definition of contract to include instruments, like a corporate charter, that reflect types of relationships between a state and its citizens fundamentally different from that represented by a contract."); McConnell, *supra*, at 290.

This Court's Contract Clause precedents have, moreover, recognized a number of distinctions that cannot be deduced from either the literal language of the Clause or the sparse evidence of the Framers' "original understanding." We have already alluded to one such distinction: that between retroactive and prospective laws. *See supra*, pp. 45-46. Other such distinctions include those between (a) legislation that *enlarges* the obligations of voluntary agreements and legislation that *diminishes* those obligations; [39] (b) legislation that rests on *inalienable* state powers (such as eminent domain and the police power) and legislation that rests on *alienable* powers the states *can* bind themselves not to exercise in the future (such as taxation); [40] (c) legislation that affects only *remedies* and legislation that affects *substantive rights*; [41] and (d) legislation that *technically* alters obligations and legislation that alters the *central* undertakings of the parties.[42]

If the Court were to adopt petitioners' "original understanding" version of the Contract Clause, most of the distinction recognized over the intervening 200 years will have to be reconsidered. Only the distinction between *remedies* and *substantive rights* is even arguably in the Clause's text; others have emerged in the ordinary process of reasoned elaboration as the Court has sought to accomodate the multiple purposes expressed in the Contract Clause and the Constitution as a whole.

Petitioners also leave out large parts of the legal understandings that formed the base for the Contract

[39] *See, e.g., Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380 (1829). 380 (1929).

[40] *See, e.g., West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (eminent domain); *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548 (1914) (police powers).

[41] *See, e.g., Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122 (1819); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

[42] *See, e.g., El Paso v. Simmons*, 379 U.S. 497 (1965); *Pearsall v. Great N. R.R.*, 161 U.S. 646 (1895).

Clause and for the Constitution as a whole. We note only the most glaring omission.

At the time the Constitution was adopted and for much of the 19th century, legal doctrine in general and constitutional law in particular recognized a basic distinction between two types of wealth now generally grouped together as "property." *Property* was conceived of as something that an individual produced with his own labor, through processes of hard work and competition open to all on equal terms. In contrast, *privilege* was understood as wealth that could be acquired only through the special aid of affirmative governmental assistance, for example, the privilege of incorporation. "The distinction between property and privilege was a widely shared, fundamental aspect of pre-twentieth century American thought that established the general context within which contract clause issues arose." Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 So. Cal. L. Rev. 1, 55 (1986).

Since "privileged" wealth was regarded as stemming from state assistance, that form of property was subject to much greater state regulations than was, *e.g.*, individually earned property. And since at the time of the Constitution's adoption, "corporations were clearly privileges," Siegel, *supra*, 60 So. Cal. L. Rev., at 67, the "original understanding" would suggest that corporate earnings are *not* the sort of interests entitled to protection from state regulation under the Contract Clause.

Thus, if the Court were to endeavor to recapture the "original understanding" of the Contract Clause, petitioners' asserted interests—the product of "privilege" and not a form of property—would likely be outside the Clause entirely.

(3) Finally, petitioners' criticism of *Blaisdell* as a departure from the "original understanding" of the Contract Clause, too, is lacking in historical perspective.

Since at least 1848, the Court has made clear that the Contract Clause does *not* limit the exercise of certain state powers, such as eminent domain, even if the State had contracted *expressly* not to use that power. *See, e.g., West River Bridge Co. v. Dix, supra.* Beginning in the late 19th century, the Court determined that the legitimate exercise of the state police power similarly is not "alienable" and similarly is beyond the Contract Clause's reach. *See, e.g., Manigault v. Springs, supra; New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 668-72 (1885).

In the era immediately preceding *Blaisdell*, however, the Court took an exceedingly narrow view of the legitimate purposes for which the police power could be invoked. Legislatures could not interfere in private economic life. To do so was viewed as "class legislation," rather than legislation for a legitimate public purpose. *See, e.g., Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45, 53 (1905).

Blaisdell's significance lies in its rejection of this narrow view of the police power. Consistent with the repudiation of *Lochner* in all its manifestations, *Blaisdell* recognizes that each State has the authority "to safeguard the vital interests of its people," including authority to protect against the economic hardships associated with a modern, highly integrated, industrialized economy. And since it had been established long before *Blaisdell* that the Contract Clause does not preclude legitimate state uses of the police power, *Blaisdell* broke little new ground in Contract Clause terms. As one scholar has said, in this sense "modern contract clause doctrine remains faithful to the original intent underlying the clause." Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1721 (1984).

Petitioners' challenge to *Blaisdell*, is in the final analysis, a challenge to *Blaisdell's* conception of the legitimate role of the police power. But in this respect, *Blaisdell* is only a small thread in the post-*Lochner* constitutional

cloth. In repudiating *Lochner*, this Court recognized that the police power can legitimately be used to promote social welfare through regulations of employment conditions and redistribution of resources. *See generally* Sunstein, *supra*, 84 Colum. L. Rev. at 1717-19.

Under *Blaisdell*, of course, States must still act for a legitimate public purpose, a requirement "guarantee[ing] that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group, supra*, 459 U.S. at 412. But when that requirement is met, it has been clear since at least the late 19th century that the Contract Clause does not preclude the kind of legislation at issue here. *See, The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 550 (1871).

Petitioners' call for overruling *Blaisdell* is, at base, a call for restoring the discredited jurisprudence of the *Lochner* era.

V. The 1987 Act Satisfies the Requirements of the Due Process Clause

Petitioners' Due Process Clause claim—that the 1987 Act's retroactive effect transgresses constitutional norms —is nothing but their Contract Clause claim rephrased.

In part III of our Argument, we have already discussed the controlling principles for judging the constitutionality of retroactive statutory regulation as stated in *Turner Elkhorn Mining Co., supra*, and *Pension Benefit Guaranty Corp., supra*, as those principles are applied under the Contract Clause's more searching standard of review.

So as not to burden the Court with a repetitive presentation, we rely on that discussion for the present purpose, and we further adopt by reference the full elaboration of the applicable Due Process Clause law in the *amicus curiae* brief of the State and Local Legal Center.

CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Point III of the Argument In the Brief For General Motors To The Michigan Supreme Court In *Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).

III.

Section 354 does not deprive any person of a vested or contractual right.

The Board also erred by concluding that application of § 354 would violate rules of statutory construction which prohibit retrospective application of statutes to take away or impair vested rights. App, pp 34a-36a. The Board's conclusion in that respect erroneously assumes that there exists a vested right to worker's compensation benefits. *Lahti* v *Fosterling*, 357 Mich 578 (1959), teaches otherwise.

In *Lahti* this Court was confronted with a claim by the plaintiff for additional medical benefits based upon an amendment to the Act which became effective after his injury. The statute in force on the date of plaintiff's injury required the employer to pay the expense of hospitalization and medical care for a maximum of four 6 month periods from the date of injury. Subsequent to the plaintiff's injury, the Act was amended to give the Bureau discretion to order unlimited additional 6 month periods of medical and hospital care to be paid by the employer. The employer contended that the right to compensation vested at the time the employee's cause of action accrued because the right to compensation arose out of an employment contract and that subsequent amendments could not modify the employee's rights or the employer's obligations.

However, this Court in *Lahti* rejected the defendant's argument and held that:

> "* * * no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law * * *." 357 Mich 578, 595.

The basis for this conclusion is that worker's compensation remedies exist as a matter of legislative grace and:

> "* * * that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." 357 Mich 578, 589.

Those principles, as enunciated in *Lahti*, were recently reaffirmed in *Selk*, *supra*. In *Selk*, as in *Lahti*, the employers argued that "'since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract'." 419 Mich 1, 11. As in *Lahti*, the court in *Selk* rejected that conclusion, citing *Lahti* and *McAvoy* v *H B. Sherman Co.*, 401 Mich 419 (1977):

> "'"* * * But we cannot say that such contractual relationship or liability necessarily precludes a subsequent Legislature from effecting changes in the Workmen's Compensation laws. Those who enter into such contractual relationships do so with knowledge of the right and power of the Legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change."'" *Lahti*, 357 Mich 578, 594-595, quoted in *Selk*, 419 Mich 1, 12.

* * * *

> "* * * 'remedies for the enforcement of a contract may be modified without violating the impairment of contract clauses'." *McAvoy*, 401 Mich 419, 457, quoted in Selk, 419 Mich 1, 12.

After discussing *Lahti* and *McAvoy*, this Court in *Selk* concluded:

> "* * * The state may, however, alter the terms of a private contract *to either lighten or increase obligations*, save where its activities constitute a substantial alteration of the terms of a contract. In the latter event, the alteration is permissible if the legislation is necessary to meet a broad and pressing social need and is reasonably related to that goal. *Allied Structural Steel Co* v *Spannaus*, 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978)." 419 Mich 1, 13. Emphasis added.

Here, the obligation of an employer remains to provide payments which equal the amount of workers' compensation awarded to the employee. What is changed is the sources from which the obligations may be met. See *Alessi*, *supra*, p 7, footnote. If the employee is receiving no pension or other employer-financed benefits, the entire obligation must be met out of worker's compensation funds provided by the employer through either self-insurance or commercial insurance. Insofar as other employer-financed benefits are available, they may be used to meet the obligation.

Should such employer-financed benefits cease, then the employer again must meet the full obligation from its own or its insurer's resources. By that means, the Legislature has insured that an injured employee always will receive that level of compensation which the Legislature has determined is necessary during the continuance of disability. Thus, if an employee's worker's compensation were coordinated because of receipt of social security benefits or a pension, he or she still would continue to receive at least the level of income the Legislature has de-

termined is appropriate. Should social security payments diminish or cease, the employer still would have to provide payments sufficient to meet the level of worker's compensation established by statute. The same would hold true if for some reason the assets of a pension plan became insufficient to meet pension obligations.

Moreover, even if there were a substantial alteration of plaintiff's right to receive a specified sum as the result of injury, which is not the case, *Selk* observes that such an alternation would be appropriate to remedy a serious social problem in the field of worker's compensation when the legislative solution is reasonably related to that problem. Like § 801, which was part of the reform package and the validity of which was recognized in *Selk*, § 354 also was part of the legislative solution to a perceived problem. The wisdom of that solution:

> "* * * is, in any event, a matter confined to the exclusive judgment of the Legislature. * * *" 419 Mich 1, 14.

Having determined that application of a 12% interest rate to payments accruing and relating to injuries occurring before the effective date of § 801 did not impair the obligation of contracts, this Court in *Selk* rejected the claim that to do so was violative of substantive due process:

> "Having found that the statute is reasonably related to a legitimate state interest for purposes of the impairment of contract claim, we conclude that defendants' due process claim is likewise without merit. In *Lahti* v *Fosterling*, *supra*, 357 Mich 591-592, we quoted from *Matter of Hogan* v *Lawlor & Cavanaugh Co.*, 286 App Div 600; 146 NYS2d 119 (1955), in holding:
>
> > "'"The due process clause of the State and Federal Constitutions does not freeze the burden of compensation liability as of the date of the occurrence of an industrial accident, beyond the

> > power of legislative change. In carrying out its social purpose, the Legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."'" 419 Mich 1, 14-15.

As the Court earlier noted in *Selk*, quoted *supra*, p 22, the State may by amendment either "lighten or increase" obligations and, as the language just quoted establishes, that may be done "even though the accident which gave rise to the disability or expenses had occurred prior to [enactment of the amendment]." Under § 354, the employer's obligation was unchanged, only the method of fulfilling it having been modified, but even if it were otherwise, *Selk* establishes that the result would be permissible.

A similar situation was presented in *In re: Certified Questions, Karl* v *Bryant Air Conditioning*, 416 Mich 558 (1982), in which the application of the comparative negligence statute to a plaintiff whose cause of action had accrued and whose case was pending prior to enactment of the statute "reduced plaintiff's damages by the corresponding amount that plaintiff was negligent, which was 95% of the total." 416 Mich 558, 562. The Court in *Karl* explained why this very significant alteration in the amount of plaintiff's recovery was not an impermissible result:

> "Comparison of 'rule three cases' [which involve 'vested' rights] to the instant case indicates that application of the products liability statute did not trigger the proscription found in rule three. First, the statute did not interfere with plaintiff's 'contractual cause of action' since an implied warranty action for personal injuries caused by a defective product is different from an express contract. Sec-

ond, this rule is also triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act. While the total damages which plaintiff could have received were significantly reduced by § 2949, plaintiff's cause of action was not legally barred or taken away.

"Section 2949 does not bar any claim, legal or equitable, but it states that 'damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.' See, also, *Li* v *Yellow Cab Co of California*, 13 Cal 3d 804, 828-829; 119 Cal Rptr 858, 875; 532 P2d 1226, 1243 (1975). Section 2949 is not a legal bar, but is a principle established by the Legislature which mitigates damages in products liability actions." 416 Mich 558, 577.

As in *Karl*, so here, plaintiff's right is not "barred or taken away"; instead, worker's compensation benefits paid directly to the worker may be diminished, but only for so long as and to the extent that other payments financed by the employer are received by the worker.

APPENDIX B

Text of Michigan HB 5084 (substitute) as approved January 29, 1986 (87-14) Adds § 354(17)-(19) and renumbers remaining subsection, as follows:

* * * *

(17) THIS SECTION APPLIES ONLY TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 362, OR 835 FOR PERSONAL INJURIES OCCURRING ON OR AFTER MARCH 31, 1982. ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 352, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE NOT BEEN COORDINATED UNDER THIS SECTION AS OF THE EFFECTIVE DATE OF THIS SUBSECTION SHALL NOT BE COORDINATED, SHALL NOT BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS, AND SHALL NOT BE SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER.

(18) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE BEEN COORDINATED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION SHALL BE CONSIDERED TO BE AN UNDERPAYMENT OF COMPENSATION BENEFITS AND THE AMOUNTS WITHHELD PURSUANT TO COORDINATION SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, TO THE EMPLOYEE BY THE EMPLOYER OR CARRIER.

(19) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY EMPLOYEE WHO HAS PAID AN EMPLOYER OR CARRIER MONEY ALLEGED

BY THE EMPLOYER OR CARRIER TO BE OWED THE EMPLOYER OR CARRIER BECAUSE THAT EMPLOYEE'S BENEFITS HAD NOT BEEN COORDINATED UNDER THIS SECTION AND WHOSE DATE OF PERSONAL INJURY WAS BEFORE MARCH 31, 1982 SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, THAT MONEY BY THE EMPLOYER OR CARRIER, and renumber[s] the remaining subsection.